

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

AMELIA PEREZ DE ACOSTA,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

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FILED
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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
EP-09-CA-038-PRM
EP-06-CR-517-PRM

MEMORANDUM OPINION AND ORDER

Before the Court is Movant Amelia Perez De Acosta ("Perez") *pro se* "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody" ("Motion to Vacate") [Docket No. 114].¹ Therein, Perez challenges her jury convictions for conspiracy to possess and possession with intent to distribute cocaine.

In order for a court to exercise subject-matter jurisdiction over a claim, the claim must be ripe for review.² A § 2255 motion filed while a direct appeal is pending is generally not ripe for consideration because "the disposition of the appeal may render the motion moot."³ "[T]he orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances."⁴ Further, the United States Court of Appeals for the Fifth Circuit has

¹ "Docket" in this context refers to the criminal docket in cause number EP-06-CR-517-PRM.

² See *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir.2003) (explaining when a "claim is not ripe for review" the court lacks jurisdiction over it); *DeCell & Associates v. F.D.I.C.*, 36 F.3d 464, 468-69 (5th Cir. 1994) (holding that when claims "are not ripe for judicial review," they must be dismissed "for lack of subject matter jurisdiction."); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1993) ("[R]ipeness is a jurisdictional requirement that cannot be waived.").

³ *Welsh v. United States*, 404 F.2d 333 (5th Cir. 1968), *abrogated on other grounds*, *United States v. Ortega*, 859 F.2d 327, 334 (5th Cir. 1988).

⁴ *Womack v. United States*, 395 F.2d 630, 631 (D.C. Cir. 1968).

specifically “held that a criminal defendant may not collaterally attack his conviction until it has been affirmed on direct appeal.”⁵ Additionally, the Fifth Circuit has long held that motions to vacate under § 2255 are “not entitled to consideration on the merits” when the direct appeal remains pending.⁶ Accordingly, a court should normally dismiss a movant’s § 2255 motion when a direct appeal is pending without prejudice to the movant reasserting his motion after the appellate court has ruled on his direct appeal.⁷

It appears from the record that Perez has an appeal pending before the Fifth Circuit.⁸ The Court finds no extraordinary circumstances justifying its consideration of Perez’s Motion to Vacate while her direct appeal is pending.⁹ Accordingly, Movant Amelia Perez De Acosta *pro se* “Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody” [Docket No. 114] is **DISMISSED WITHOUT PREJUDICE** for lack of subject-matter jurisdiction.

SO ORDERED.

SIGNED this 9th day of February 2009.



PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE

⁵ *Fassler v. United States*, 858 F.2d 1016, 1019 (5th Cir. 1988).

⁶ *See Jones v. United States*, 453 F.2d 351, 352 (5th Cir. 1972) (holding that a motion to vacate under section 2255 is “not entitled to consideration on the merits” when the direct appeal remains pending).

⁷ *Id.*

⁸ *United States v. Perez De Acosta*, No. 08-50151 (5th Cir. appeal docketed Feb. 12, 2008).

⁹ *See United States v. Wollard*, 416 F.2d 50, 51 (5th Cir. 1968) (citing *Womack* favorably).